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Supreme Court, U.S.
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No. 92-712

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DAVID G. STAUFFACHER and
JOHN P. STAUFFACHER,

Petitioners,

v.

JOHN A. BENNETT and
FIRST HERITAGE SAVINGS CREDIT UNION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

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December 5, 1992

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REPLY ARGUMENT

(1.) Issues Stated in Compartmentalized Fashion with Only Enough Factual Detail to Identify Controlling Jurisdictional Facts Upon Which the Various Personal Jurisdictional Theories Presented Might be Resolved by the Supreme Court

This is not a simple contract or tort case where the jurisdictional facts would be relatively straight forward. This is a case with complex multiple claims, multiple defendants, and allegations of common law fraud, conspiracy, securities fraud, and a RICO enterprise involving Respondents. Accordingly, the facts Petitioners felt necessary to state in the specific issues for review under SUP. CT. R. 14. 1 (a) are lengthy but arguably appropriate in order to identify and comparmentalize the various jurisdictional theories. Petitioner further does not wish to inadvertantly waive any issues by failing to state them. The "issue" as

presented by Respondent does not particulary encapsule any of the facts for the required particularized assessment of the relationship among the defendants, the forum and the litigation. Shaffer v. Heitner, 433 U.S. 186,204 (1977). To the extent the issue format is too detailed, the Petitioners apologize for their genuine effort to be thorough.

(2.) Respondents' Reliance Upon The Facts "Found" By The District Court and Seventh Circuit is Incorrect

The entire matter of personal jurisdiction is reviewable de novo as a question of law and higher Courts should not be bound by the lower Courts' factual findings. Datatronic Rental Corporation v. De Sol, Inc., 164 Wis. 2d. 289, 292; 474 N.W. 2d. 780, 782 (Wis. Ct. of App., 1991), a fortiori, where factual findings are "clearly erroneous". U.S. v. Hocking 860 F.2d. 769, 772 (7th Cir., 1988) (Branti v.

Finkel, 445 U.S. 502, 526, n. 6 (1980) cited by Respondents did not involve denovo review of a motion to dismiss for want of personal jurisdiction, but involved 8 days of evidentiary hearings in a full Court trial. Id, at 508)

(3.) Contrary to Respondents' Position, Wis. Stats. 801.05 (5)(b) was raised in the District Court and the Seventh Circuit, and its application is factually Supported by the Record. Further, Findings Made By the District and Appellate Courts were Clearly Erroneous

At Response, p. 8 and 9, Petitioners' are accused of "arguing new and different facts and to argue the legal issue of personal jurisdiction only under their alternate scenario." Except for indeed, being one "alternate" scenario, this is incorrect.*

<*Petitioners raised Wis. Stats. 801.05 (5)(b) in the District Court in their Proposed Conclusions of Law of 3/19/91, p. 9, and alleged and argued, inter alia, that Bennett, and

Bennett on behalf of First Heritage, accepted substantial deposits from the Wisconsin residents in two seperate transactions, Id, at 7; that Defendant First Heritage did continuous and substantial business with Plaintiffs while Plaintiffs were in Wisconsin, Id,p. 6, and that these defendants (Respondents) knew that the invested funds would be borrowed from Wisconsin Banks, Id, at 6. The various signed contracts were Exhibits to the Complaint and were verified in the Stauffacher affidavit.>

In the Seventh Circuit, Wis. Stats. 801.05 (5)(b) was asserted as alternate grounds for personal jurisdiction in Appellants' Supplemental Authority for Case #91-3023; dated 4/10/92. Appellant argued the applicability of this statute -- ie, "services of providing loan guarantees in Wisconsin performed by the plaintiff on defendants' behalf, pursuant to written agreements and with their acknowledgement or ratification"-at length at oral argument.*

<*At argument there was also significant questioning on this precise issue from the panel of

judges.>

A.) The District Court summarily dealt with this "alternate theory" (Wis. Stats. 801.05 (5)(b) at Petition, p. 30(a):

> A.) "Neither Bennett nor First Heritage serviced the Plaintiffs in the State of Wisconsin".

This is true but it misperceives Petitioners' position.

B.) At Petition, p. 30(a), the District Court found that:

> "The trust arrangements did not require Bennett or First Heritage to perform any activites in Wisconsin."
>
> This is true but irrelevant.

C.) At 22 (a), the district court found:

> "It appears that plaintiffs are attempting to establish personal jurisdiction over defendants Bennett and First Heritage by examining their own actions. Specifically, borrowing money and depositing this money into First Heritage as concemplated by the agreements. It is a well established rule that 'unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the

forum state.' Hanson, at 253."[emphasis added]

This application of Hanson v. Denckla, 357 U.S. 235 (1958) is in direct conflict with Wis. Stats. 801.05 (5)(b) cited by Petitioners. The lower court failed to apply its own findings that it is Stauffacher who performed the credit provisions services in Wisconsin as contemplated by the agreements.

"[In Wisconsin], so long as the facts of the case are within Wis. Stats. 801.05, the novelty of the factual situation is not a sufficient basis for ruling that the Wisconsin long-arm statute is inapplicable to a situation. Moreover, nothing in the Wisconsin long-arm statute makes the motive for a defendants' activities determinative of the statutes application. If the defendant's actions fall withing language of the long-arm statute, and if they constitute sufficient "minimum-contacts" such that the maintainance of the suit does not offend traditional notions of "fair play and substantial justice", International Shoe v. State of Washington, 326 U.S. 310,316, (1945), then personal jurisdiction may be exercised over them:" Maney v.

Ratcliff, 399 F. Supp. 760,767, (E.D. Wis 1975).

D.) At Petition,p. 22(a), another clearly erroneous finding was made by the district court:

> "It must be further noted that none of the agreements contained a requirement that the plaintiffs borrow money from Wisconsin Banks."

This is clearly erroneous since the "Stauffacher Guarantee of Dolan Loan" agreement of 10/12/89 <Comp. Ex. #3> specifically required Stauffacher to guarantee Dolan loans of $1,500,000,including the $500,000 loan of 10/12/89 at First Wisconsin National Bank, an agreement acknowledged and/or ratified by Bennetts' signature in the 11/6/89 trust agreement <Comp. Ex. 4> , the $500,000 being deposited into First Heritage.*

<*In the Seventh Circuit, Petitioners objected to this particular finding at

Ap. BR.,p. 38. Unlike Respondents' contention at Response, p. 8, Petitioners also objected in the District Court to the District Court's "findings of fact" in their 5/29/91 Plaintiffs' Objection to Def. Bennett's Motion to Dismiss, p. 2 and 3.

Furthermore, Bennett's and First Heritage's dismissals of 5/31/91 were consolidated by a Stipulation for Dismissal which read, in part:

"The defendants' First Heritage Savings Credit Union and John Alexander Bennett do not oppose consolidation by plaintiff of a dismissal order applicable to Bennett with any appeal of the dismissal order applicable to First Heritage.">

Respondent submitts, at p. 10,

"Clearly, due process would have compelled both the District Court and the Seventh Circuit to dismiss this case on the facts found. The Stauffacher's cannot-and don't-dispute this. There tact is to argue new and different facts and argue the legal issue of personal jurisdiction under their alternate scenario."

The first part of this quote has some ominous logic. The second part just isn't correct. The review should be de novo. It would always be relativly easy to pick

through any foreign defendant jurisdictional dispute and find facts which go against jurisdiction. The Courts below should have applied those facts which support jurisdiction and resolved them in plaintiffs' favor. Wisconsin Electric Manufacturing Co, Inc. v. Pennant Products, Inc, 619 F.2d. 676, 677 n.1 (7th Cir. 1980) Further, Petitioners made a conscious and deliberate effort to only seek relief on claims under U.S. laws and over which Canada would not have exclusive jurisidction (i.e., Canada would have exclusive jurisdiction over title to mineral lease property.)

Respondent also contends, at Response, p. 19,:

> "There is no adequate factual basis which supports a further review. The jurisdictional issues were never pleaded or preserved for review."

Many of Respondents' "waiver" arguments

were also made to the Seventh Circuit, disputed by Petitioners and, apparently, rejected by the Seventh Circuit, especially Respondents' attempt to rely upon the "findings of fact" made by the District Court.

Further misstatement of the record is made by Respondents, in their Response, at p. 12:

> "The second joint venture agreement was to be supplemented by the terms of the first joint venture agreement and further stated that, at Bennett's election, it could serve as the trust agreement for the second mineral lease (Complaint, Exh. 3, para. 4D)." [emphasis added]

The written election option, however, was clearly Stauffacher's. (Comp. Exh. 3, para. 4D, Appellant's Appendix-7th Cir., p. A-98) Another error made by the District Court,and misstatement by Respondents at Response, p. 14, is to refer to the consent to jurisdiction

clause as a "choice of law" clause. The clause in the first Joint Venture Agreement Comp., Exh. #1 (which supplemented the terms of subsequent agreements between Petitioners and Respondents) read as follows:

> "20. Any controversey or claim arising out of or relating to this Partnership Agreement shall be settled by the Federal United States District Court of the Western District of Wisconsin."

This is consent to the jurisdiction of a particular District Court. This isn't an agreement to apply Wisconsin law where appropriate nor mere guidance on how to resolve a conflict of laws for some Canadian Court. Further, the trustee Bennett would clearly have been able to resort to the District Court in the Western District of Wisconsin to resolve some related controversies, a benefit to which he availed himself by participating

as trustee in these arrangements, and by acknowledging or ratifying the Second Joint Venture agreement and the Wisconsin loan guarantee agreement.*

<*First Heritage was acknowledged by Respondent First Heritage to be principal of agent Bennett for purposes of the motion to dismiss for want of personal jurisdiction. (..."defendant's reply will assume that Bennett was First Heritage's agent", Def. First Her.'s Response to Pltf's Proposed Findings of Fact (#9) dated 3/29/91, at p. 5; Accord, Dist. Ct. at Pet. Br.,p. 15 (a)) This ratification and acknowledgment by Bennett must, therefore, apply to First Heritage. Accordingly, First Heritage has purposefully availed themselves also.>

4.) Unlike Respondents' Position, Federal Securities Law (in Conjunction with Fed.R.Civ.Pr.4) Does Provide A Basis For Personal Jurisdiction

Unlike Respondents' contention at Response, p. 19, and the Seventh Circuit at Petition, p.9(a), a RICO plaintiff may rely on another federal jurisidctional statute for international service under Fed.R.Civ.Pr. 4 (e) and (f) (notwithstanding nationwide

service of process authorized by 18 U.S.C 1965 (b)). Omni Capital Int'l. Ltd. v. Rudolf Wolff and Co. Ltd., 484 U.S. 97, 104-105 (1978). The jurisdictional statute which gives Fed. R.Civ.Pr. 4 (e) and (f) a "boost" (allowing international service) is 15 U.S.C. 78 (a)(a). Brinks Mat. Ltd. v. Diamond, 906 F.2d. 1519, 1522, (11th Cir., 1990) recognized that State jurisdictional Statutes may also expand RICO jurisdiction under Fed.R.Civ.Pr. 4 (e), but did not hold that this was the only circumstance in which service of process allowed under 18 U.S.C. 1965 (b) could be exceeded. Further, Brinks did not hold that merely alleging a RICO claim would diminish the broad jurisidiction otherwise available under a separately alleged securities claim. 15 U.S.C. 78(a)(a) was raised below and Petitioners also cited, argued

and were questioned as to this concept at oral argument in the Seventh Circuit.

5.) Unlike Respondents' Contention, the District Court and Appellate Court did Base Decisions Upon Due Process Considerations

The District Court decided the motion primarily on a due process analysis:

> "Here, the plaintiffs invoke numerous provisions of the Wisconsin long-arm statute to demonstrate the appropriateness of personal jurisdiction. The contacts which Bennett and First Heritage had with the State of Wisconsin do not comport with due process. Because the tenants of due process have not been met there is no need to linger over the Wisconsin long-arm provisions." [Emphasis added] Pet. Br., p. 20 (a)

The trial court also acknowledged the existance of Bennett's signatures on the two trust agreements with the Petitioner as beneficiary. <Pet.Br., p. 17 (a) and 20 (a).> Without explanation, the Seventh Circuit, however, disregarded Bennett's two trust agreements. The only references

by the Seventh Circuit to Bennett were:

> "for the most part we shall not need to discuss Bennett, its [First Heritage's] employee, separately.."
>
> "All the credit union actually did... apart from occassional, unspecified, and seemingly trivial communications by Bennett, was to receive a deposit from a Wisconsonite." <Pet.Br., p. 3 (a)>

This completely disregards the two written trust agreements between beneficiary Stauffacher and Trustee Bennett of First Heritage. This seriously wounds the due process conclusions of the Seventh Circuit. <"The totality of First Heritage's U.S. contacts is too sparse to bring it within the grasp of the U.S. Courts"; Pet. BR., p. 9 (a)> The record in the District Court and submitted to the Seventh Circuit, as well as the argument in the Seventh Circuit, is repleat with references about the two written trust agreements.

The Seventh Circuit decision should be reviewed and clearly reversed. If an appellate court can disregard properly raised jurisdictional and controlling facts presented to arrive at its written opinions, we may get some future precedent for easy cases, but the tough cases will go unresolved and justice is denied to the litigant that had the right to appeal in the first place. 28 U.S.C. 1291; Fed.R.App.Pr. 4(a) (1). Such a case should also be reviewable as to both law and fact by the U.S. Supreme Court under whatever remains of U.S. Const., Art.III, Sec. 2, para. 2.

6.) Respondents' Other Contentions are Not Grounds for Denial of Certiorari

At Response, p. 6, Respondents cite Bishop v. Wood, 426 U.S. 341, 346 (1976) for the proposition that anytime a district and

appellate court agree on state law, the Supreme Court is foreclosed from review. This is incorrect, as Certiorari was granted to Bishop in Petition #74-1303; 423 U.S. 890 (1975) for the Supreme Court to review the constitutionaly of the lower courts' application. Furthermore, Bishop V. Wood, 426 U.S., at 346, n. 10, cites United States v. Durham Lumber Co., 363 U.S. 522 (1960) and Popper v. Clark, 337 U.S. 472, 486-87 (1948), noting that the Supreme Court will not defer if the conclusions are "unreasonable." In Stauffacher v. Bennett, the lower courts did not utilize the law cited by Petitioners <"There are other provisions of the long-arm statute but none remotely applicable." (7th Cir., Pet.Br., p.4 (a))> This is "unreasonable." The Seventh Circuit even disregarded the clearly supported findings made by the District

Court as far as the existance of the two trust agreements signed by Bennett and Stauffacher. This is manifestly "unreasonable".

Respondents also cite Turnock v. Cope, 816 F.2d. 332, 333 (7th Cir., 1987) for the proposition that:

> "Because the (trial) court received proofs, it was not obligated to rely on the allegations of the complaint where those allegations were contradicted." <Resp. Br; p. 8>

Plaintiff filed no affidavits while defendant filed detailed affidavits in Turnock v. Cope, 816 F.2d., at 334. In Stauffacher v. Bennett, Petitioners filed the extensivly detailed complaint, reply, brief and affidavit with factual proofs. Respondents provided short, conclusory denials of Wisconsin contacts and stressed Canadian contacts. As the crow flies, Hope, B.C. is less than 30 miles from the

State of Washington where First Heritage admittedly has contacts with the U.S. Why, when First Heritage and Bennett do some business with Washington residents and get millions of dollars from and have 2 trust agreements with two Wisconsin residents is it unreasonable for the foreign defendants to anticipate that they might be haled into a U.S. Court? Globalization of business transactions made easy by telecommunications as we have it today would have been unthinkable in the days of International Shoe v. State of Washington, supra. The effect of the lower courts' rulings was to decide on the merits, even though the substantive liability to the plaintiff is supposed to be irrelevant. Wis. Stats. 801.03 (1) and Rose V. Franchetti, 713 F. Supp. 1203 (N.D. Ill., 1989). Stauffacher, who demanded a jury trial in the complaint,

should have been entitled to a jury trial on the substantive merits. U.S. Const. Amend. V, VII and XIV; Wis. Const. Art. 1, Sec 1, 5 and 9.

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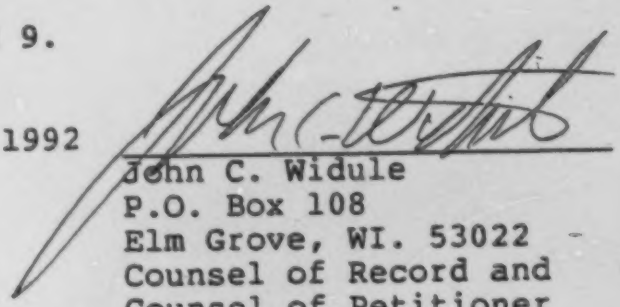

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